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Nos. 82-354, 82-355, 82-398

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*, *Petitioners*,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*, *Respondents*.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION, *Petitioners*,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*, *Respondents*.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*, *Petitioners*,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*, *Respondents*.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR THE AMERICAN INSURANCE ASSOCIATION, *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS*

The American Insurance Association is an unincorporated trade association of 168 publicly-owned property and casualty insurers who write substantial amounts of private passenger and commercial automobile insurance in the United States. In 1981, the Association's members wrote a total of $5.3 billion in

private passenger automobile insurance premiums, accounting for more than fifteen percent of the market for such insurance. The Association has long been committed to promoting highway safety. It has a substantial interest in the implementation of the automatic crash protection requirements of Federal Motor Vehicle Safety Standard 208, and in any clarification or modification of Standard 208, because its members are certain that mandatory installation of passive restraint systems will significantly improve the safety of automobiles driven on the country's highways and will, consequently, affect the insurance market.

Accordingly, the American Insurance Association, as *amicus curiae*, supports the implementation of Safety Standard 208 and believes that the Department of Transportation, through the National Highway Traffic Safety Administration ("NHTSA"), acted unlawfully in rescinding the passive restraint requirement. Consent to file this brief has been obtained from all parties pursuant to Rule 36.2 of the Rules of this Court.

ARGUMENT

Introduction And Summary Of Argument

This *amicus* brief is being submitted not to restate or add to any argument made by the respondents but to present, for the Court's consideration, three discrete and relatively simple propositions:

First, although this case, in its present posture, involves the validity of a final rule issued by an Executive Department in October 1981 with an accompanying statement of reasons, a reviewing court should not blind itself to the history of administrative decision-making on this subject—and particularly to official public explanations made by the Executive Department less than nine months before issuing its final rule. It is patent from the complete record of administrative action that the decision by NHTSA to rescind the passive restraint regulation in October 1981 was influenced in large measure by the

same economic considerations that (1) had induced NHTSA in February 1981 to delay the imposition of the identical passive restraint requirements and (2) had caused it in April 1981 to propose amendments to the Safety Standard imposing those requirements. The primary economic consideration expressly invoked by NHTSA in its earlier rulings—the depressed state of the domestic automobile industry—is a totally impermissible factor for NHTSA to evaluate and utilize under the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1976). By the time its final ruling was issued, NHTSA realized that it could not lawfully base its decision to withdraw the automatic safety requirement explicitly on the economic difficulties of the automobile industry. Consequently, the published explanation that accompanies NHTSA's October 1981 decision strikingly omits a justification on which NHTSA depended heavily in its earlier public pronouncements. Such calculated silence at the eleventh hour should not bar a reviewing court from considering the realities proved by earlier official pronouncements.

Second, NHTSA's stated reason for rescinding *in toto* the passive restraint requirement suffers from so obvious a logical flaw that it calls to mind the fairy tale of the Emperor's New Clothes: It must be obvious to a child that just as the Emperor truly had no clothes, NHTSA, notwithstanding its flurry of words, has no rational basis for doing what it has done. NHTSA invoked the 1966 Safety Act through several Administrations to develop a safety standard for a goal that has been uniformly found to be necessary and desirable—a protective system not dependent on action by a vehicle's occupants. In order to provide the greatest latitude to each automobile manufacturer to achieve this objective within its own financial and technological capabilities, NHTSA gave its official blessing to two forms of passive restraint. NHTSA has now found fault with one of the two officially approved options that most automobile manufacturers would have unilaterally chosen, and on this basis NHTSA has discarded the entire Safety Standard—including the unquestioned safety goal and the remaining effective option. No principle of law or rational

regulatory policy permits an agency entrusted with the lives and safety of millions of Americans so arbitrarily to flush away a live and vigorous baby with what it finds to be dirty bathwater. We do not agree with NHTSA's poorly reasoned and unjustified rejection of automatic belts as a passive restraint option. But in any event, it was arbitrary and capricious for NHTSA not to adjust its safety standard to its new findings by simply eliminating the alternative which it now finds inadequate to achieve the desired safety objective, and requiring use of air-bags, a form of passive restraint that NHTSA does not question at all.

Third, we turn to the relief which should be granted here. If this Court agrees that the Safety Standard should have been amended by NHTSA to retain whatever alternative is effective, the court of appeals should be directed to order NHTSA promptly to implement such an amended standard. Judicial decisions have approved the entry of such orders. If, on the other hand, the petitioners' positions are sustained and this Court decides that the court below applied a review standard that exceeded its statutory authority, the question of the validity of NHTSA's rescission of Safety Standard 208 should be returned to the court of appeals for decision in light of the correct standard of review. This Court has had occasion recently to apply this principle in the analogous context where a court of appeals, in reviewing a district court's judgment, concluded that the district court had utilized an erroneous legal standard. The appellate court's proper function is then to remand the case to the district court for it to apply the correct legal standard to the facts. By the same token, if the petitioners prevail, the court of appeals should be directed in this case to evaluate the bulky administrative record by the correct standard of review. It is not this Court's duty to announce that standard and, at the same appellate juncture, to apply itself the correct yardstick to the particular facts.

I

NHTSA'S RESCISSION OF SAFETY STANDARD 208 WAS UNLAWFUL BECAUSE IT RESTED UPON EARLIER OFFICIAL ACTIONS PROMPTED BY THE AGENCY'S IMPERMISSIBLE CONCERN OVER THE DEPRESSED ECONOMIC STATE OF THE DOMESTIC AUTOMOBILE INDUSTRY.

The Safety Act established a regulatory structure under which the Secretary of Transportation or his designee[1] was directed to issue objective motor vehicle safety standards to carry out the Act's purposes. Like other legislation, the Act enumerated those considerations that the Executive Branch officer or his designee—in this case, NHTSA (*see* 49 C.F.R. §§ 1.50(a), 501.2 (1981))—may evaluate. Plainly, NHTSA is not authorized to import into its determinations of safety standards a host of factors that are within the areas and expertise of other federal agencies. It would, for example, be improper for NHTSA to consider federal tax policy in deciding when and how to impose federal auto safety regulations. By the same token, it would be impermissible for NHTSA to determine its safety standards by weighing issues of labor relations, foreign policy, or antitrust law. Consequently, had NHTSA stated on October 23, 1981, that it was rescinding the passive restraint requirement of Safety Standard 208 because of the depressed state of the domestic automobile industry—a subject that should be of no concern to the agency—that action would have been patently unlawful. It would have been an instance of an agency exceeding its authority by rendering a decision based on factors that Congress had not committed to its appraisal.

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[1] When the Safety Act was passed, the Department of Transportation did not exist, and the statutory function was assigned to the Department of Commerce. Shortly thereafter, in October 1966, the Department of Transportation was created by Pub. L. 89-670, 88 Stat. 1533 (1966) (codified at 49 U.S.C. § 1652(a) (1976)), and in 1967 NHTSA's precursor, the National Highway Safety Bureau, was formed. *See* 32 Fed. Reg. 8225 (1967). NHTSA came into existence and assumed responsibility for federal motor vehicle safety standards in 1978. *See* 43 Fed. Reg. 8525 (1978).

NHTSA did not, in fact, explicitly rest its October 23, 1981, ruling on the depressed state of the automobile industry. But several formal steps leading to rescission, which were taken in the same year that rescission was announced, were explicitly based on the economic ills of the domestic automobile industry. After relying upon that impermissible consideration as it moved towards rescission, NHTSA cannot avoid the consequences by merely omitting any mention of this economic factor when the final step is taken.

A. NHTSA Explicitly Cited The Automobile Industry's Economic Difficulties As The Principal Reason For Delaying And Proposing to Amend The Passive Restraint Requirements.

(1) NHTSA proposes delay to help the industry.

On February 12, 1981, less than seven months before implementation of the first phase of compliance with the passive restraint requirements, and barely three weeks after Secretary of Transportation Drew Lewis took office, NHTSA proposed a one-year delay, from September 1, 1982, until September 1, 1983, in the effective date of the automatic restraint requirements for large cars.[2] 46 Fed. Reg. 12033 (1981) (R. 1622).[3] One stated reason for the proposed delay was the

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[2] This came soon after the automobile manufacturers sent President Reagan a long letter asking for a number of Executive Branch concessions to aid the industry. As reported in a February 9, 1981, issue of *Automotive News* (reproduced as Appendix A to this brief), the letter asked the Department of Transportation "to reevaluate the need for the passive-restraint standards" as well as to establish "a reduced bumper standard—from 5 MPH to 2.5 MPH for longitudinal forces and a reduction in corner requirements to 1.5 MPH." The passive restraint requirements were delayed on April 9, 1981, and rescinded on October 23, 1981. The bumper standard was reduced, precisely as requested by the automobile industry, on May 20, 1982. 47 Fed. Reg. 21820.

[3] References to the Joint Appendix filed by the parties in the Court of Appeals are cited as "R. ____." References to the Appendix to the Petition for a Writ of Certiorari filed by the Motor Vehicle Manufacturers Association are cited as "Pet. App. ____."

"changed economic circumstances since the schedule was adopted in 1977." *Id.* Explaining the basis for the proposed delay, NHTSA emphasized the well-known "difficulties of the automobile industry and some of its members."[4]

(2) NHTSA grants delay to maintain sales and profits in the industry.

Two months later, in April 1981, the agency adopted the one-year delay (46 Fed. Reg. 21172 (R. 1272)), despite the fact that all of the professional economists' cost-benefit analyses indicated that the economic costs of the delay greatly exceeded its benefits. *See* R. 511, 606, 714. The "current poor economic condition of the automobile industry" was again a crucial factor underlying the agency's action. 46 Fed. Reg. at 21173 (R. 1273). The final notice announcing the one-year delay declared (46 Fed. Reg. 21174 (R. 1274) (emphasis added)):

> On the basis of the record herein, the Department has concluded that the applicability of FMVSS 208 in MY 1982 to large cars would be impracticable and unreasonable. Requiring such compliance *would reduce sales and profits, and increase unemployment, for the manufacturers of such vehicles.*

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[4] NHTSA stated (46 Fed. Reg. 12033-34 (R. 1622-23)):

> Sales continue at a very depressed level. . . . Losses by even the largest of the domestic manufacturers have been reported. These losses come at a time when the domestic manufacturers must continue to spend unprecedented sums to meet the continuing demand for ever more fuel efficient cars and to meet the challenge of foreign car manufacturers.
>
> . . . [I]mplementation now may shift some demand from large cars to mid-size cars at a time when large car sales are already slumping badly.
>
> * * *
>
> [D]elaying the first phase of the current schedule for one year will provide manufacturers with substantial financial and engineering resources to devote toward . . . other important product programs. . . . If the Department should decide to adopt a one year delay for large cars, GM and Ford together could defer up to $37 million in investments, according to industry figures.

NHTSA asserted at the time that the Safety Act authorized it to consider the "general economic health of the automobile industry," not only in deciding whether to delay implementation but also in deciding whether to rescind or retain a safety standard (46 Fed. Reg. 21175 (R. 1275)). This reasoning was explained as follows *(id.)*:

> What is reasonable and practicable for a healthy firm or industry may not be for an ailing one. . . . Vehicle sales remain at depressed levels and unemployment in the domestic industry is extremely high. . . .
>
> The Department concludes . . . that economic hardship to the affected industry and individual companies must be balanced with all other considerations in determining the "reasonableness" and "practicability" of a particular safety standard.

(3) NHTSA proposes rescission because of the industry's "economic difficulties."

When it adopted the one-year delay, NHTSA also proposed, as one of several alternatives, the rescission of the Safety Standard's passive restraint requirements. 46 Fed. Reg. 21205 (1981) (Pet. App. 147a). In so doing, it again emphasized the poor economic condition of the domestic automobile industry. NHTSA said that the "same factors" set forth in the initial notice and final rule for the one-year delay had also led it to propose totally rescinding the automatic restraint requirements. 46 Fed. Reg. 21206-07 (Pet. App. 152a). NHTSA said it was considering rescission partly because of (46 Fed. Reg. 21206 (Pet. App. 151a) (emphasis added)):

> the substantial impact of automatic restraints on manufacturer and consumer costs and *the accentuation of those manufacturer impacts by the economic difficulties of the automobile industry.*

(4) NHTSA's steps are described as "Actions to Help the U.S. Auto Industry."

A telling indication of the primacy given to the economic condition of the automobile industry in NHTSA's April 1981 actions was the title of the public announcement made by the White House Press Office. Both the final order adopting the

one-year delay and the notice proposing possible rescission were included in a package distributed to the press under the title "Actions to Help the U.S. Auto Industry" (R. 1281, 1285, 1318-1321).[5]

B. In The Absence Of An Explicit Repudiation, NHTSA Should Be Presumed To Have Issued Its Final Rule In Accordance With The Primary Considerations It Expressed At Earlier Stages In Its Process.

Having emphasized the difficult straits of the automobile industry at the stages leading up to the final rule issued on October 23, 1981, NHTSA cannot simply omit reference to that important consideration at the most critical point and thereby remove it from the sight of a reviewing court. The agency's published explanation of its final rule rescinding the passive restraint requirement, 46 Fed. Reg. 53418 (1981) (Pet. App. 88a), did not highlight or even cite explicitly the misfortunes of the automobile industry. There were, to be sure, several passing references in the final rule and accompanying Regulatory Impact Analysis ("RIA") to the possibility of reduced automobile sales.[6] These were ambiguous enough that they could

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[5] Also announced as part of the "Actions to Help the U.S. Auto Industry" was a proposed amendment of the uniform tire quality grading standards (R. 1322). On February 2, 1983, NHTSA suspended the tire grading system. *See New York Times*, February 3, 1983, p. A1 (reproduced as Appendix B to this brief).

[6] *See, e.g.*, 46 Fed. Reg. at 53423 (Pet. App. 105a), where NHTSA explained that automatic restraint requirements were not "reasonable" and "practicable" partly because

> while the car manufacturers might be able to pass along some or all of their costs [of complying with the safety standard] to consumers, the necessary price increases would *reduce sales*. . . . [T]hose sales losses would cause net employment losses. *Additional sales losses might occur due to consumer uncertainty about or antipathy toward the detachable automatic belts* . . . .

See also 46 Fed. Reg. 53426 (Pet. App. 117a), where NHTSA said that rescinding the automatic restraint requirement would enable "the car manufacturers to reallocate $400 million in capital investment that they would have had to allocate for the purpose of completing their [compliance] efforts."

not be said to relate unequivocally to the economic ills of the industry. In addition, at a press conference held on the day that the rescission was issued, the NHTSA Administrator claimed that he placed no reliance "whatsoever" in his "personal decision" on "the current economic slump in the automotive industry."[7]

But NHTSA's published explanation contained no explicit repudiation or rejection of the assertion that had theretofore been made by NHTSA that the economic condition of the automobile industry required amelioration of the passive restraint requirement. While that previously important factor was not, at the ultimate stage, explicitly reaffirmed, it was also not rejected or explicitly disclaimed.

This state of the record is similar to what this Court confronted in *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607 (1980). That case involved the validity of the Occupational Safety and Health Administration's ("OSHA's") benzene standard. When it initially pro-

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[7] Transcript of remarks of Raymond Peck, Administrator, National Highway Traffic Safety Administration, at a news conference on October 23, 1981, at 8.

In answer to the question which immediately followed, however, he said, "It is, of course, a fact that the industry is in distress; but that fact alone cannot ever be a determinative question on the issue of a safety standard. It was certainly not determinative in this case." The use of the words "alone" and "determinative" implies that the state of distress was one factor that was considered, even if not the determinative one. This is consistent with a statement that the Administrator made when opening the press conference. He said (*id.* at 2):

> Other factors, changed since 1977, have also been taken into account. These include, of course, estimates of the cost to the consumer of the technology that would be used, and the economic circumstances of this injury [*sic*]. No one factor has been determinative. My overwhelming concern has been safety.

The word "injury" makes little sense in the context of the full paragraph. The word "industry" fits the context more than any other word with similar sound.

posed its standard—which barred benzene in even very minute quantities such as one part per million parts of air—OSHA had indicated that it was placing the burden of proving safety on industry representatives because it viewed benzene as a carcinogen. This Court's plurality opinion, per Justice Stevens, assumed that in its final decision OSHA had applied the standard it had originally announced in its proposed ruling. *See* 448 U.S. at 623-25, 635-36. In dissent, Justice Marshall noted that OSHA did not have to rely on its "Draconian carcinogen 'policy' " (448 U.S. at 695), and that it had, in fact, conducted seventeen days of hearings and heard from ninety-five witnesses (448 U.S. at 696) on the dangers of benzene in even minute quantities. Justice Marshall then observed that OSHA issued "an extensive statement of reasons summarizing and evaluating the results of the hearings" (448 U.S. at 697), so that its decision was not explicitly based on its "carcinogen policy."

The Court's plurality in the benzene standard case looked, however, not alone at what OSHA had said,[8] but at the standards and principles on which it had relied in its earlier proposed rulemaking. Finding an impermissible standard at that juncture, it carried that standard over to the final ruling and invalidated the ruling, over the dissent of four Justices, because of it. By the same token, the final rule NHTSA issued should be invalidated because the agency never repudiated the judgment that special administrative actions, including delay and amendment of passive restraint requirements, should be taken to accommodate automobile manufacturers because of the economic difficulties of the industry.

It is true, of course, that a reviewing court ordinarily judges an administrative action by the explanation the agency has given. *See Securities and Exchange Commission* v. *Chenery*

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[8] The Court said that "discussion . . . must, of course, *begin* with the Agency's rationale. . . ." 448 U.S. at 631. It did not say that published rationale was the last word on the subject—only that discussion must "begin" with it.

Corp., 318 U.S. 80, 95 (1943); *Federal Trade Commission* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974). There are, however, times when, within the four corners of a particular agency statement, one cannot find the true considerations that led to the agency action. When such considerations have been articulated in earlier public pronouncements, a court should assume that they have influenced the final action taken by the agency.[9] If an agency has specifically reconsidered its earlier published views and determined to repudiate them, it should formalize this determination in the agency's published statement of reasons. If the agency fails to make any such statement, a reviewing court should conclude that notwithstanding the omission of the prior consideration from the final published statement, it continues to have a significant impact on the agency's determination—as this Court held in the benzene standard case.

C. Consideration Of The Economic Condition Of The Automobile Industry Is Beyond NHTSA's Statutory Authority.

It is a fundamental tenet of administrative law that an agency must act within its statutory mandate. *See, e.g., American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490, 540 (1981); *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 659 (1981); *Atchison, Topeka and Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 806 (1973) (plurality opinion); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-69 (1962). Agency decisions must be "based on a consideration of the

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[9] Compare *American Federation of Government Employees* v. *Devine*, 525 F. Supp. 250, 253 (D.D.C. 1981), where a District Judge rejected reasons stated by the Office of Personnel and Management for taking certain actions and concluded that the motivation was "prompted primarily by ideological considerations." *See also American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490, 540 n.74 (1981), where this Court refused to accept a "boilerplate" statement as the true reason for agency action and an impermissible consideration had been weighed and expressed by OSHA.

relevant factors" under the authorizing statute. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971) (emphasis added). *Accord, Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

The Safety Act directs NHTSA to issue "appropriate" motor vehicle safety standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." 15 U.S.C. § 1392(a). The agency is also directed to consider whether a proposed standard "is reasonable, practicable and appropriate for the particular type of motor vehicle . . . for which it is prescribed," and "the extent to which such standards will contribute to carrying out the purposes" of the Safety Act. 15 U.S.C. § 1392(f)(3),(4). The Safety Act specifically instructs the agency to consider "relevant available motor vehicle safety data" (15 U.S.C. § 1392(f)(1)), but it does *not* tell the agency to consider the economic health of the automobile industry. The Act's legislative history and judicial decisions interpreting the Act clearly establish that NHTSA has no authority to consider the general economic condition of the automobile industry in deciding when and whether to implement passive restraint requirements.

(1) The legislative history indicates that the economic welfare of the automobile industry is not to be considered by NHTSA.

The purpose of the Safety Act is "to reduce traffic accidents, deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. Congress intended "safety . . . [to] be the overriding consideration in the issuance of standards." S. Rep. No. 1301, 89th Cong., 2d Sess. 6 (1966) (hereinafter "*Sen. Rep.*"). *See also* H. R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966) (hereinafter "*H. R. Rep.*") ("Motor vehicle safety is the paramount purpose of this bill and each standard must be related thereto.")

In enacting the Safety Act, Congress was well aware of the automobile industry's conviction that "safety doesn't sell." *Sen. Rep.* 2. The Report expressed its concern over "the auto-

mobile industry's chronic subordination of safe design to promotional styling and . . . [its] overriding stress on power, acceleration, speed, and 'ride' to the relative neglect of safe performance or collision protection." *Sen. Rep.* 2. While Congress did not foresee the current industry slump, it plainly intended to impose safety standards without capitulating to industry claims that compliance would reduce automobile sales. Senator Mondale, who was heavily involved in drafting the Safety Act, accorded minimal weight to charges that the Safety Act "is unfair to the automobile industry . . . and that the threat of its passage has affected the volume of sales which in turn has influenced the economy." 112 Cong. Rec. 14246. He acknowledged that "the obvious objective of any businessman" was to "attract customers," but emphasized that "there is well documented . . . evidence showing that [the automobile] could be so designed and so constructed as to protect the driver and passengers from death and injury in most kinds of accidents." *Id.*

Representative Ryan noted that auto "industry spokesmen have wailed that this legislation will be damaging to both the industry and the national economy." His answer was that Congress' "primary concern must be . . . the pain, the grief, the permanent disabilities, and the thousands of deaths motor vehicles cause every year. . . . The lives of American citizens must come first." 112 Cong. Rec. 19647. *See* 112 Cong. Rec. 19654 (Rep. Tenzer) (rejecting automobile industry's argument that Safety Act "will have an adverse impact on automobile sales" as invalid "especially when weighed against the purpose of the legislation—the saving of human lives"). These statements all show that Congress did not intend to let the sales curve for the industry determine the death and injury curve on the Nation's highways.

The terms "practicable," "reasonable," and "appropriate," as used in the Safety Act, were not intended by Congress to permit the general economic condition of the automobile industry to enter into decisions to issue or revoke particular safety standards. The Senate Report explained that by requiring that

safety standards be "reasonable" and "practicable," Congress meant that the Secretary was to issue standards covering "only . . . those vehicle characteristics that have a significant bearing on safety," rather than "every component and function of a motor vehicle." *Sen. Rep.* 6. The Senate Report added that "tests of reasonableness of cost, feasibility[10] and adequate lead time"[11] should be included among the factors considered in the development of safety standards under the Act. *Id.*

Floor debates on the bill show that the Senate Report's references to "reasonableness of cost" and "practicability" are to the *direct costs* of the safety device itself, and do not authorize consideration of the general economic condition of the regulated industry. Senator Lausche stated (112 Cong. Rec. 14245 (emphasis added)):

> In the committee, an extensive discussion took place concerning the right of the Secretary to consider the costs that would be entailed in promulgating the adoption of certain types of equipment. It was argued by some that the language did not allow the Secretary to *consider the cost that would be added to the automobile.*

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[10] The Senate Report uses "feasibility" in its ordinary meaning, and clearly intended that the agency was to consider whether the safety requirements mandated by a standard were "capable of being done." *See American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. at 508-09 (defining "feasibility" as "capable of being done, executed or effected").

[11] The Senate Report also indicates that economic factors relating to lead time may be considered under the Act. It stated that in deciding whether to specify an effective date later than the normal one-year maximum for compliance, the agency could consider whether requiring across-the-board compliance within one year is "a practical economic and engineering impossibility, as well as a source of great hardship and unnecessary additional cost." *Sen. Rep.* 7. Like the references to the economic realities of lead time in the House (*see* pp. 16-17 & n.12, *infra*), nothing in this Senate Report statement indicated that the general economic condition of the industry, caused by a sales slump and unrelated to lead time considerations, was meant to be a relevant factor in deciding whether to impose a particular safety standard.

> . . . It was finally agreed to write into the report a certain understanding which was to be used as a guide in interpreting the language used.

The "certain understanding" was then read. It related to the Secretary's authority to consider the costs added to the automobile by virtue of a safety standard. Senator Magnuson, the floor manager and Chairman of the Senate Committee on Commerce, quoted the Senate Report's instruction that "reasonableness of cost, feasibility, and adequate lead time should be included among those factors which the Secretary could consider in making his total judgment." 112 Cong. Rec. 14245.

House floor discussion of the term "practicability" also fails to provide support for NHTSA's consideration of the general economic condition of the industry. The House Report relates the Act's practicability requirement to "consideration of all relevant factors, including technological ability to achieve the goal of a particular standard as well as consideration of economic factors." *H. R. Rep.* 16. NHTSA relied on this reference to "economic factors" for its published position that the economic condition of the auto industry is a permissible factor in issuing or rescinding the passive restraint requirements. *See* 46 Fed. Reg. 21175 (R. 1275). But the House debates demonstrate that in making "economic factors" relevant under the Act's practicability requirement, Congress intended the agency to consider costs associated with the adequacy of lead time for implementing a particular safety standard, not the general economic health of the automobile industry.[12]

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[12] Representative Dingell, a member of the House Committee on Interstate and Foreign Commerce who was actively involved in the drafting and passage of the Safety Act, explained that "a standard is not practicable or reasonable if it cannot be met by the best efforts of manufacturers within the constraints of time and technology." To assure practicability, "[a]mong those economic factors which the Secretary will have to consider is the matter of adequate lead time." The agency was to consider whether the normal compliance period would cause cause "exorbitant cost or . . . severe economic disloca-

Nor does the Act's "appropriateness" criterion authorize NHTSA's consideration of the sales prospects of the depressed auto industry. The Senate Report indicates that the requirement that safety standards be "appropriate for the particular type of motor vehicle" was included so the Secretary could "consider the desirability of affording consumers continued wide range of choices in the selection of motor vehicles" and that he would not eliminate particular types of cars by applying to them standards that were unsuitable. *Sen. Rep.* 6. The House interpreted the "appropriateness" directive the same way. *H.R. Rep.* 18; 112 Cong. Rec. 19649 (Rep. Dingell). *See also Chrysler Corp.* v. *Department of Transportation*, 472 F.2d 659, 679 (6th Cir. 1972).

In summary, none of the broad terms used in the Safety Act to define the Secretary's authority was intended by Congress to empower him to grant general reprieves based on economic appraisals of the automobile industry. Just as the Federal Trade Commission may not permit manufacturers to engage in unfair and deceptive practices simply because they are in economic difficulties and the Securities and Exchange Commission may not allow the sale of unregistered securities whenever it believes the stock markets are experiencing a slump, NHTSA may not approve the manufacture of unsafe cars merely because automobile manufacturers are experiencing an unprofitable period.

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tion," such as would occur if "the cost of compliance on a crash basis . . . [was] so great as to price vehicles out of the mass market." 112 Cong. Rec. 19648. The Act's practicability criterion authorized consideration of "economic factors" to determine whether it would be "a physical or economic impossibility" for manufacturers to comply with a standard within the normal statutory compliance period. To meet this problem the Secretary was authorized to "make the standard effective later than one year from its issuance if he finds that this is in the public interest . . . ." 112 Cong. Rec. 19648.

(2) No judicial precedent authorizes consideration of this factor.

In light of the clear legislative history, none of the cases construing the Safety Act even discusses the possibility that the general economic condition of the regulated industry can be a relevant factor for safety standard decisions. The cases hold only that the agency may consider whether a standard is so onerous that it cannot be performed by those subject to it. In *Chrysler Corp.* v. *Department of Transportation*, 472 F.2d 659, 672-73 (6th Cir. 1972), which endorsed NHTSA's authority to issue the prior 1972 restraint standard requiring development of new technology, the court stated that the Act's mandate did not "suggest that the Agency might impose standards so demanding as to require a manufacturer to perform the impossible, or impose standards so imperative as to put a manufacturer out of business." In *H & H Tire Co.* v. *Department of Transportation*, 471 F.2d 350, 354-55 (8th Cir. 1973), the court agreed "that 'the fact that a government regulation may cause economic hardship to a party does not make such regulation unreasonable.' " *See also, National Tire Dealers & Retread Association, Inc.* v. *Brinegar*, 491 F.2d 31, 33, 37-38 & n.34 (D.C. Cir. 1974). These cases do not suggest that NHTSA may properly consider the auto industry's short-term economic interests in making a safety-standard decision.

In like vein, nothing in the discussion of economic feasibility in *American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490 (1981), suggests that an agency may consider the current economic distress of an industry, as distinguished from an inquiry into its basic economic viability under the particular regulation. That case held that a regulation is economically feasible if it permits the affected industry to "maintain long-term profitability and competitiveness." 452 U.S. at 530-31 n.55. It cited with approval two cases that stand for the proposition that a statute's feasibility qualification

> is not intended to provide a route by which recalcitrant employers or industries may avoid the reforms contemplated by the Act. Standards may be economically

> feasible even though, from the standpoint of employers, they are financially burdensome and affect profit margins adversely. Nor does the concept of economic feasibility necessarily guarantee the continued existence of individual employers. . . .

Industrial Union Department v. *Hodgson*, 499 F.2d 467, 478 (D.C. Cir. 1974); *accord*, *United Steelworkers of America* v. *Marshall*, 647 F.2d 1189, 1265 (D.C. Cir. 1980), *cert. denied sub nom. Lead Industries Association, Inc.* v. *Donovan*, 435 U.S. 913 (1981).

Under *American Textile Manufacturers Institute* v. *Donovan*, when a regulation issued under a statute with a feasibility requirement threatens to put the affected industry out of business or to cause massive economic disruption, it is appropriate for an agency to examine the rule's impact on production, employment, competition, and prices in order to determine whether compliance is "within the financial capability of the covered industry." 452 U.S. at 530-31 n.55. But that is not what NHTSA did. No claim was nor could have been made that the average incremental cost of the passive restraints would drive auto manufacturers out of business by pricing cars out of the reach of ordinary consumers, or that compliance would require exorbitant capital expenditures by the industry, or that the standard would otherwise catastrophically disrupt the industry. Rather, NHTSA considered the economic condition of the industry out of a desire to improve auto sales and profits. That consideration conflicts with the feasibility analysis contemplated by *American Textile Manufacturers Institute* v. *Donovan*, or by any other case of which we are aware. NHTSA's appraisal of the economic health of the auto industry was as fully outside its statutory authority as was OSHA's wish "to repair general unfairness to employees . . . unrelated to achievement of health and safety goals" when it issued a wage guarantee provision in its Cotton Dust Standard. *American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. at 540. Consequently, NHTSA's rescission of the passive restraint requirement, affected by this consideration, must be set aside.

II

NHTSA ACTED IRRATIONALLY AND ARBITRARILY IN FAILING TO RETAIN THE PASSIVE RESTRAINT REQUIREMENT WITHOUT THE ALLEGEDLY INEFFECTIVE AUTOMATIC BELT OPTION BY REQUIRING AIR-BAGS.

In the first portion of this *amicus* brief we have argued that NHTSA's expressed reasons for rescinding the passive restraint requirement should not be taken as the total rationale for its decision. A reviewing court should determine the validity of the rescission in light of the agency's previously expressed—and still unrepudiated—policies on the same subject, which laid great stress on the poor economic condition of the industry. We turn now to an alternative argument that takes NHTSA's explanation at face value. Even if the Court were to ignore the various public statements indicating that NHTSA accommodated automobile safety to the economic needs of the automobile industry and were to look no further than the final rule and RIA of October 23, 1981, it is patent that the agency's explanation is illogical and irrational. The conclusion reached by the agency—that the safety standard should be rescinded *in toto*—does not follow from the findings and policies announced by NHTSA.

We begin with a proposition that NHTSA does not question at any point in its statements of October 23, 1981—that automatic or "passive" crash protection is a highly desirable goal. Commitment to that objective is expressed at the beginning of NHTSA's explanations of the rescission and is even more firmly repeated in the concluding paragraph of the "Summary of Agency Conclusion" (46 Fed. Reg. 53426 (Pet. App. 116a) (emphasis added)):

> After 12 years of rulemaking, NHTSA has not yet succeeded in its original intent, the widespread offering of automatic crash protection that will produce substantial benefits. *The agency is still committed to this goal* . . . .

Safety Standard 208 sought to implement this objective by authorizing automobile manufacturers to use either of two

passive restraint devices—(1) an air cushion restraint ("air-bag") or (2) an automatic belt (which does not require buckling by the occupant). There was no suggestion in the history of the development of Safety Standard 208 that if only one of these two options had been technologically feasible, no passive restraint system would have been initiated. In other words, the availability of equally effective alternative technologies was not a precondition of NHTSA's institution of the safety standard. If only air-bags had been technologically developed by 1977, it is clear that a passive restraint standard requiring the use of air-bags would have been issued at that time. Indeed, in 1977 it had been estimated that more than sixty percent of new cars would be equipped with air-bags, and less than forty percent with automatic belts. 46 Fed. Reg. 53420 (Pet. App. 95a). Automatic belts were added to the safety standard as an alternative only because it was then thought that automatic belts were as effective as air-bags in achieving the safety goal. It would have been unfair to automobile manufacturers to bar use of an alternative passive restraint that was no less protective.

NHTSA has now determined that detachable automatic belts will not achieve the desired result. We disagree with this conclusion, which was rejected by the court of appeals and is forcefully challenged in the respondents' briefs. Respondent State Farm demonstrates cogently in its brief that nondetachable automatic belts do not share the problems of detachable automatic belts which led the agency to its conclusion. But even resolution of the detachable/nondetachable debate in favor of petitioners would not justify acceptance of NHTSA's rescission of the entire passive restraint standard. No rational decision-maker could conclude from any finding made by NHTSA that air-bags should no longer be required.

This is the point at which there is an unbridgeable chasm between NHTSA's new finding and the conclusion that no passive restraints should now be required. Rather than reverting, as reason requires, to the remaining uncontestedly effective passive restraint (which was initially to be the primary

technology used by the industry), NHTSA has, without a single word critical of air-bags, discarded totally the passive restraint obligation it initially imposed on automobile manufacturers and thereby sacrificed the lives of thousands of Americans.

Absolutely no reason was given in NHTSA's published statements of October 23, 1981, for the rejection of air-bags as an obligatory form of passive restraint.[13] It appears that the only reason for refusing to consider air-bags was that the automobile manufacturers had previously determined to comply with Safety Standard 208, if it was to be enforced, by installing automatic belts rather than air-bags.[14] This industry decision—which was doubtless based on the anticipated greater costs of air-bags than belts—effectively controlled

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[13] Petitioner MVMA asserts that "the existing record abounds with references to the difficulties that an airbags-only standard would raise, including questions about the installation of airbags in small cars . . . ." MVMA Brief at 39 n.71. This assertion has not, however, been made by the responsible agency, and it cannot, therefore, be a basis for sustaining the agency's decision. Moreover, when NHTSA promulgated the 1977 passive restraint requirements, it said (42 Fed. Reg. 34289, 34295 (1977) (R. 1740)):

> Although the shorter crush distance of small cars may impose more stringent limits on air bag deployment time, . . . there are no insuperable difficulties in meeting the . . . requirements of Standard 208 in cars as small as 2,000 pounds . . . with existing air bag designs.

In addition, NHTSA continues to find that air-bags are technically sound. *See, e.g.*, RIA at XI-4-5 (R. 264-65).

[14] *See* RIA at XI-6 (R.226):

> Whether the auto companies are right or wrong [in deciding not to use air bags], the Agency cannot change their decision. Since air bags will *not* be used to comply with the standard, the analysis must focus on automatic seat belts.

See also RIA at XI-5 (R. 265) ("The issue of air bags . . . is not in fact squarely before the Agency at this time. . . . Manufacturers' plans for compliance, at least in the short run, do not include air bags.")

NHTSA's judgment. On the premise that only one percent of new cars would be equipped with air-bags, NHTSA did not even discuss the effectiveness of air-bags in achieving the still-desired safety goal.

Here, again, NHTSA's reasoning was hopelessly illogical. Obviously, if automatic belts were eliminated as a permissible alternative because they are ineffective in achieving the desired safety result, 100 percent of new cars, rather than one percent, would be equipped with air-bags.

NHTSA does not appear to question in the slightest the effectiveness of air-bags. Indeed, its "Summary of Agency Conclusion" refers to the "almost certain benefits that had been anticipated as a result of the use of air bag technology." 46 Fed. Reg. 53425 (Pet. App. 112a).[15] NHTSA has also referred to the added economic incentives for air-bag use provided by "premium reductions generally . . . available only to owners of cars equipped with air bags. . . ." 46 Fed. Reg. 53423 (Pet. App. 106a). There are, therefore, significant and unrebutted benefits in the use of air-bags, which, by any rational standard, should remain as required safety features in new automobiles.[16]

NHTSA's total failure to consider and implement the remaining effective and technologically sound passive restraint is the same kind of error that caused this Court to direct that an agency's determination be vacated in *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608 (1946). The Federal Trade Commission had totally prohibited use of the name "Alpacuna" on coats because it believed that the name was misleading and deceptive. This Court held it to have been

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[15] Air-bag technology has continued to improve, and air-bags are being used as options in highly desirable automobiles. *See New York Times*, February 3, 1983, p. D2, reproduced as Appendix C to this brief.

[16] Although air-bags do cost more than automatic belts, they are still cost-effective. *See* Nordhaus Comment, May 1981, at 15 (R. 525).

error for the Commission "not to have considered" whether qualifying language accompanying the name "would eliminate the deception which it found lurking in the word Alpacuna." 327 U.S. at 613. The Court said (*id.*):

> [T]he Commission seems not to have considered whether in that way the ends of the Act could be satisfied and the trade name at the same time saved. . . . [W]e are left in the dark whether some change of name short of excision would in the judgment of the Commission be adequate.

By the same token, NHTSA failed to consider how the consistently approved safety goal of requiring an effective passive restraint could be reconciled with its recent conclusion that automatic belts cannot do the job. That was the agency's responsibility, and, as was true in *Siegel*, a reviewing court is "left in the dark" whether action short of rescission—particularly implementation of an air-bag requirement—would not satisfy both objectives. Indeed, by any rational measure, that is the way both objectives could and should be achieved.

Nor was there any procedural obstacle to NHTSA's amendment of Safety Standard 208 to prescribe the use of air-bags only. NHTSA had authority to amend Standard 208, and as the government concedes, "NHTSA in fact did consider" amending the standard to mandate compliance by belts with a use-compelling feature. Brief for the Federal Parties at 36; *see* 46 Fed. Reg. 53424 (Pet. App. 109a-110a). It is therefore difficult to understand how the government can now contend that if NHTSA had amended Standard 208 to require compliance by air-bags "it might have faced challenges from the manufacturers and others on the ground that its notice of proposed rulemaking did not give adequate warning that such a rule might be adopted." Brief for the Federal Parties at 37.

In any event, the notice of rulemaking was adequate to have permitted NHTSA to amend Standard 208 to bar detachable belts and require compliance by air-bags or nondetachable belts, since it identified one of the issues as "the most effective and reasonable approach to addressing the safety problems posed by the low rate of safety belt use." 46 Fed. Reg. 21206

(R. 13). Commentators responding to the notice understood that the scope of the rulemaking encompassed possible amendments to Standard 208, and several commentators suggested on the record that detachable belts be barred. *See* 46 Fed. Reg. 53424 (Pet. App. 109a). It is well established that "[a]n agency need not publish in advance every precise proposal it may ultimately promulgate as a rule." *McCulloch Gas Processing Corp.* v. *Department of Energy*, 650 F.2d 1216 (Temp. Emer. Ct. App. 1981). Notice is sufficient if it apprises interested persons of the "subject and issues" before the agency and therefore affords a reasonable and meaningful opportunity to participate in the rulemaking process. *McCulloch Gas Processing Corp.* v. *Department of Energy*, 650 F.2d at 1221; *Forester* v. *Consumer Product Safety Commission*, 559 F.2d 774, 787 (D.C. Cir. 1977); *International Harvester* v. *Ruckelshaus*, 478 F.2d 615, 632 n.51 (1973). So long as the agency furnishes such notice of the subject and issues, the final regulations actually adopted may be "substantially more stringent" than the proposals outlined in the notice of rulemaking. *American Iron & Steel Institute* v. *Environmental Protection Agency*, 568 F.2d 284, 293 (3d Cir. 1977); *International Harvester* v. *Ruckelshaus*, 478 F.2d at 632 n.51; *McCulloch Gas Processing Corp.* v. *Department of Energy*, 650 F.2d at 1221.

In summary, NHTSA arbitrarily and irrationally refused to direct use of air-bags or even to evaluate their cost-effectiveness simply because the auto industry was not planning to install them. In this way it allowed an anticipated industry preference for allegedly ineffective technology to define the agency's inquiry into the reasonableness and practicability of the safety standard. NHTSA thus failed to discharge its statutory duty independently to promulgate reasonable and practicable safety standards to protect the American public from unnecessary injury and death on the nation's highways. Precisely because NHTSA lost sight of this statutory duty, no "rational connection exists between the facts found" by NHTSA—that automobile manufacturers intended to install detachable automatic belts and that such belts were functional-

ly equivalent to manual belts—and the decision NHTSA made to rescind the entire passive restraint standard without considering whether compliance with air-bags would render it reasonable and practicable. *See Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962). For this reason, NHTSA's rescission order is arbitrary and capricious, and must be set aside.

III

THE CASE SHOULD BE REMANDED TO THE COURT OF APPEALS EITHER TO DIRECT NHTSA TO ENFORCE THE AIR-BAG REQUIREMENT OR, IF PETITIONERS PREVAIL, TO HAVE THAT COURT APPLY THE CORRECT STANDARD

Our final point relates to the matter of remedy. We submit that in any event, whether petitioners or respondents prevail, the court of appeals must be called upon to make substantive judgments beyond those it has already made. If the respondents are upheld in their contention that NHTSA erred in failing simply to strike the detachable automatic belt alternative, or if the Court agrees with us that at least the air-bag option should have been imposed, the court of appeals should be instructed to direct the agency promptly to amend Safety Standard 208 in accordance with this Court's conclusion. As we demonstrate below, it is well within the authority of reviewing courts to take such direct measures.

If, on the other hand, petitioners prevail in their argument that the court of appeals "misapprehended or grossly misapplied" the correct standard of review, the case must be remanded to the court of appeals for *that* court to apply the correct standard. This Court's decisions clearly establish that this is a task that must be assigned to the court having the primary reviewing function and should not be assumed by the court which has only an appellate role.

A. The Court Of Appeals Should Order NHTSA To Issue An Amended Safety Standard.

The court of appeals was not prepared to issue an order directing implementation of an amended Safety Standard 208. It gave NHTSA time to submit a proposal for "resolving the questions raised" in its opinion, and thereafter directed that the standard be implemented for the 1984 Model Year. If this Court were now to conclude that it was irrational for NHTSA to rescind rather than amend Safety Standard 208, the appropriate remedy would be to direct the agency to issue the amendment. That direction should be given, of course, by the court of appeals on remand of the case from this Court.

If an agency fails to implement and enforce its organic regulatory statute, courts may order the administrative action that the agency itself should have undertaken. In the leading case of *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*), the court of appeals agreed with the district court's conclusion that the then-Department of Health, Education and Welfare had failed to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976). It then upheld with minor modifications, the district court's order directing the agency to enforce Title VI by, *inter alia*, commencing administrative enforcement proceedings against certain segregated school districts, demanding explanations of racial disproportion from other school districts, and monitoring districts under court desegregation orders. 480 F.2d at 1161. This judicial action was a fitting exercise of the judiciary's responsibility "to assure that the agency properly construes its statutory obligations, and that the policies it adopts and implements *are consistent with those duties and not a negation of them.*" 480 F.2d at 1163-64 (emphasis added).

In *Davis* v. *Romney*, 490 F.2d 1360 (3d Cir. 1974), the Third Circuit found that the National Housing Act imposed a duty on the Federal Housing Administration to "make reasonable efforts to ascertain that the homes securing FHA-insured mortgages meet Housing Code standards" (490 F.2d at 1368), and held that a reviewing court could order injunctive relief

tailored to remedy the harm to the plaintiffs inflicted by the agency's failure to conform to the requirements of its regulatory statute. 490 F.2d at 1370. *See also Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 439 F.2d 584, 593-95 (D.C. Cir. 1971); *Rockbridge* v. *Lincoln*, 449 F.2d 567, 569-70 (9th Cir. 1971).

These cases establish that even in areas generally left to agency discretion, courts may order agencies to take particular administrative action necessary to effectuate the congressional intent expressed in the agency's organic statute. *See* Stewart & Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1195, 1197-98 & n.13 (1982); Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1755 (1975) ("When the agency has clearly failed to protect the beneficiaries of the administrative scheme, courts have gone so far as to mandate appropriate enforcement measures.")[17] In this case NHTSA may and should be promptly

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[17] *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), is not to the contrary. The Court observed in *Dunlop* v. *Bachowski* that the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 481 *et seq.*, "relie[d] upon the special knowledge and discretion" of the Secretary of Labor to determine whether to bring suit to set aside union elections. 421 U.S. at 576. Accordingly, the Court directed that generally "the court's review should be confined to examination of the [Secretary's] 'reasons' statement, and the determination [of] whether . . . the decision . . . [was] arbitrary and capricious . . . [without an adjudicatory hearing on the complainant's] challenges to the factual bases for the Secretary's conclusion. . . ." 421 U.S. at 572-73. *Dunlop* v. *Bachowski* specifically left open the possibility that the reviewing court could find the Secretary's decision to be arbitrary and capricious and would then be "empowered to order the Secretary to bring a civil suit against the union to set aside the election." 421 U.S. at 575. The Court recognized that compelling the Secretary to bring suit "obviously presents some difficulty in light of the strong evidence that Congress deliberately gave exclusive enforcement authority to the Secretary," but it then suggested, by citing *National R.R. Passenger Corp.* v. *National Assoc. of R.R.*

ordered to issue an amended Safety Standard incorporating the technologically suitable means for achieving automatic or passive restraint in cases of automobile crashes.

B. The Court Of Appeals Has The Primary Duty To Apply The Correct Legal Standard To The Record.

We turn now to a second possibility—*i.e.*, that this Court may hold that petitioners are correct in their challenge to the standard of review actually applied by the court of appeals. If this Court were to uphold that argument, it would be inappropriate for this Court to rule directly on the validity of NHTSA's rescission of Safety Standard 208. This Court should, rather, remand the case to the court of appeals so that court could apply the correct standard to the voluminous administrative record.

This Court has said frequently that it intervenes in the review of agency decisions by courts of appeal "only when the standard [of judicial review] appears to have been misapprehended or grossly misapplied." When that happens, this Court traditionally remands the case to the court of appeals for its consideration in light of the correct standard. *National Labor Relations Board* v. *Walton Manufacturing Co.*, 369 U.S. 404, 408 (1962). *See Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491, 497 (1951); *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 621 (1966); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 547, 549 (1978).

This limited role is consistent with the course this Court has recently instructed courts of appeal to take in reviewing district court judgments. In *Pullman-Standard* v. *Swint*, 102 S.Ct. 1781 (1982), this Court reversed a decision of a court of

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Passengers, 414 U.S. 453, 465 (1974) (Brennan, J., concurring), and *Nader* v. *Saxbe*, 497 F.2d 676, 679-80 n.19 (D.C. Cir. 1974), that even in situations involving prosecutorial discretion, a court may order the agency to pursue judicial action if its refusal to do so " 'went [beyond] any rational exercise of discretion.' " *National R.R. Passenger Corp.*, 414 U.S. at 465.

appeals which had not only vacated a district court's factual conclusion but had entered its own contrary finding. This Court said (102 S.Ct. at 1791-92):

> When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings. . . . Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue.

In this analogous situation, this Court should, if petitioners prevail, remand this case to the court of appeals so that it may review the administrative record by the correct legal standard.

CONCLUSION

For the foregoing reasons, as well as those stated by respondents and *amici* supporting their position, the decision of the court of appeals invalidating NHTSA's rescission of Safety Standard 208 should be affirmed or the case remanded to the court of appeals with instructions to direct NHTSA to issue promptly an amended Safety Standard requiring installation of effective passive restraints in new automobiles.

Respectfully submitted,

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February 7, 1983

APPENDIX A

Makers tell Reagan of worry, recommend actions to help

By Brian Rahe
Automotive News Staff

WASHINGTON — Domestic vehicle makers have sent a letter to President Reagan, spelling out the industry's concerns in the areas of capital formation, government regulation, Japanese competition and general economic welfare.

A specific position paper on recommended changes in the Clean Air Act is also under consideration but is not yet complete.

Automotive News has learned the fairly lengthy letter to the President stresses reductions in federal spending to aid the economy and reduce pressure on capital markets.

In the area of trade, the recommendation was closer to the task taken by General Motors than to Ford Motor Co.'s calls for temporary quotas.

The industry urged the President to take the initiative in persuading the Japanese government to voluntarily reduce immediately and substantially the flow of Japanese cars into the U.S. for a considerable but undefined period.

The industry also asked that regulation be reduced when big cost savings can be made with minor societal effects.

• The President was also asked to encourage investment in U.S. business via better capital cost recovery allowances and a refundable tax credit. He was encouraged to expand R&D with tax incentives and extend energy tax credits for investments made to produce more fuel-efficient products.

Accompanying the letter to the President, Automotive News has learned, was a fuller supporting document. It urged capital formation and envisioned depreciation measures similar to those in the Jones-Conable bill and popularly known as 10-5-3.

It called for refundable tax credits, refundable R&D tax credit and an extension to 10 years of the 7-year limit on carrying forward excess investment tax credits and net operating losses.

It also asked for a reduction in the corporate tax level to 45 percent.

The domestic makers urged that the average useful life for machinery be reclassified from the current 12 years to nine.

It called for a special tax write-off, applicable in the vehicle year it is placed in service, and an expansion of the energy tax credit to cover equipment used to make fuel-efficient vehicles. This should be refundable, they said.

The industry also wants the National Ambient Air Quality Standards to be set only to protect the public against unreasonable risk of significant health effects.

It wants to create an independent review group, require risk analysis, provide peer review for all proposed standards and allow five amendments a year for each short-term standard if the current standard is retained.

• The industry wants less stringent CO and NOx levels for cars and trucks. It wants a maintenance standard for HC (apparently leaving to Ford's petition) which would mean 0.39 gpm instead of the current maximum 0.41 gpm.

The industry wants the 1982 diesel particulate standards retained unless EPA can show a need for stricter control—a position well-known to be GM's.

For heavy-duty truck emission standards, the industry wants to maintain current test procedures instead of the ones proposed for '84 models.

It also wants a change in the definition of "useful life" to reaffirm the half-life concept.

It wants a 40-percent failure rate allowed for assembly-line testing of heavy and light trucks, instead of the current 20-percent failure rate.

The industry wants to maintain 1982 high-altitude requirements instead of the '84 model-year provision which would require a common standard at all altitudes. Ford has been especially concerned about high-altitude rules despite some concessions from EPA.

For light trucks, the industry wants the 1984 extended useful life durability requirement eliminated. It wants averaging, instead of car-by-car compliance, for emission standards. It also wants to use averaging for production certification of prototypes and recalls.

Leadtime should be figured from the date of the promulgation of a rule, domestic makers said. And they urged EPA to consider cost-effectiveness analyses for all its proposed regulations.

As for noise standards—which have just been delayed for a year—the industry wants the ill-fated standard withdrawn and no further action until a need is clearly shown.

The industry wants DOT to reevaluate the need for the passive-restraint standards. It also wants a reduced bumper standard—down 1 MPH to 2.5 MPH for longitudinal forces and a reduction in corner requirements to 1.5 MPH.

The industry wants no fuel-economy standards beyond 1985. And it wants DOT to look at both the economic impact of new standards and the cumulative impact of existing standards when comparing safety benefits.

Automotive News

February 9, 1981

Technology | Marshall Schuon

Car's Air Bag: How It Works

WHEN Mercedes-Benz announced last week that it would offer an air bag restraint system in some of its 1988 cars, company officials said they knew the move would intensify a debate that has been under way for the last 14 years. But, they said, the technology that is at the heart of the argument has been tested successfully in more than 20 million miles of driving, and the only thing that remains uncertain is customer demand.

Air bags — devices that inflate to protect occupants in a head-on crash — seemed to be a good idea when they were proposed in the late 1960's. It was not long, though, before criticism and doubt began to pile up. In particular, critics said, the sodium azide that was used to generate the inflating gas was dangerous and, perhaps, carcinogenic. Further, it was said, the bags could inflict injury if they inflated inadvertently, and the cost of the complicated system would add greatly to the price of a car.

Nonetheless, passive restraints — air bags or automatic seat belts — were mandated by the Federal Government in 1977, with enforcement to begin with full-size 1982 models. After postponements, the rule was rescinded last Oct. 29 as part of the Reagan Administration's easing of regulations in the ailing auto industry. Consumer groups protested, however, and the matter is pending.

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The 1988 Mercedes system will be available on the large S-class sedans and on the 300E and 300D coupe-is that will come to America in October. According to the company, these models will account for 60 percent of sales here, and the system will be considered successful if it is ordered on 30 percent of the cars.

The system provides an air bag and knee bolster for the driver and a seat belt tensioner for the front-seat passenger. The tension device is triggered by the same computer that activates the air bag, and it withdraws the normal seat belt slack-ness to hold an occupant firmly in place. The knee bolster keeps the driver from "submarining" under the wheel in a frontal crash.

Drawing of air bag to be available in some 1988 Mercedes-Benz cars. It will cushion driver's head and chest, while a tensioning retractor will pull slack out of passenger's seat belt.

The brain of the system is an electronic deceleration sensor, which, aside from other functions, according to the company, is "to detect an accident, react accordingly, monitor readiness of the air bag and store information." To do this, the black box on the transmission tunnel uses an accelerometer to convert deceleration into an electrical signal. The signal is amplified and processed by an integrated circuit and, in the event of a crash at the equivalent of 12 miles an hour into a fixed barrier, a current ignites a canister of sodium azide to inflate the air bag.

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The bag itself is made of neoprene-coated nylon and is folded on top of the canister inside the hub of the steering wheel. The 60 grams of sodium azide are stored in the form of sapphire-sized tablets in the canister. They ignite rapidly, much like bleach powder in open air, and release a cloud of nitrogen to fill the bag, popping open the center of the steering wheel and presenting a horn-shaped bottom to cushion the driver.

The bag has four venting holes, each about an inch in diameter, and it deflates when the driver hits it. Inflation takes only one-thirtieth of a second, according to the company, and the whole "accident event" from impact to deflation to inflation to deflation takes less than a second. At the same time, current also ignites a tiny charge in the seat belt tensioning device on the floor at the passenger's door pillar. The explosion drives a piston to retrieve a pulley that retracts the seat belt, eliminating slackness.

According to the company, 12,000 of the units have been sold in Europe since a phase-in began in December 1985. In that time, official reports show, 37 of the cars have been involved in accidents, only five of them severe enough to activate the air bags. Of these five, only one involved an injury. In that one, the driver was not wearing a seat belt and suffered a cut thumb.

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Additionally, according to the company, there have been no reports of inadvertent deployment of the air bags, a fact attributable to several failsafes in the system. One of them is a mercury switch, which must be closed by impact before current can flow to the sodium azide. Another is the accelerometer, which decreases its sensitivity as an impact deviates from the center line of the vehicle.

Company engineers rebut the argument against the dangers of sodium azide by noting that its storage and the way it is used pose no threat. For one thing, they say, it releases harmless nitrogen when burned. For another, tests have shown that it will not detonate through shock. At one point, Mercedes tested the canister by firing at it with an armor-piercing rifle. The bullet caused the chemical to burn, the engineers said, but it did not explode.

Replacement of the unit — done by changing the entire steering wheel — is recommended every six years, because the air bag deteriorates along its folds. The sodium azide, on the other hand, has an indefinite life. If there is one problem with the sodium azide, it comes when a car is junked. Even then, according to the company, it can be purposely triggered, harmlessly recycled.

APPENDIX C

APPENDIX B

THE NEW YORK TIMES

February 3, 1983

A14

Tire-Rating System, Reliability Disputed, Is Suspended by U.S.

By MICHAEL deCOURCY HINDS

Special to The New York Times

WASHINGTON, Feb. 2 — The Reagan Administration today suspended a grading standard that provides consumers with information for comparing the durability of 89 brands of automobile tires in 2,000 sizes and styles.

The Administration and most major manufacturers of replacement tires, a $9 billion industry in 1982, contend that the tread-wear grading system is unscientific and that consumers may be misled by it.

Raymond A. Peck, Administrator of the National Highway Traffic Safety Administration, said today, "We just cannot reliably tell whether a higher-graded tire will wear better than a lower-graded tire. The standard is not only failing in its primary purpose of informing consumers, it is misleading some of them."

In spite of the standard, including consumer advocates, one tire maker and some Government and independent engineers, contend that the grading system is reliable and that errors in the ratings generally favor the consumer. Errors in the system, are known and could be easily corrected, they say.

"Consumers want and need a grading system to make informed purchases of tires, and the system does correctly rank-order tires," said Robert E. Berdahl, a vice president of the Uniroyal

Continued on Page A14, Column 1

AGENCY SUSPENDS TIRE-GRADING RULE

Continued From Page A1

Tire Company. The company, which primarily supplies tires to the General Motors Corporation, regularly advertises its tires' tread-wear ratings as a way to increase its sales of replacement tires.

Martin J. Wertheim, a spokesman for the Michelin Tire Corporation and today that the company, which strongly opposed the ratings, significantly underrated its tires "to show our disregard for the procedure."

Today the safety agency also dropped tire makers to delete references to the grading system when making new claims for tires. This action makes the suspension, even if temporary, will have a long-term effect.

The tread-wear rating is currently stamped on every tire sold in this country. The ratings are expressed in grades, with every 10 grades equaling 2,000 miles. An explanatory label pasted on each tire contains statements that the ratings should be used for comparative purposes only and that tire performance varies considerably with driving habits, climate and road surfaces.

Under the standard, companies put their tires through a 6,400-mile road test monitored by the safety agency, then assign their own tread-wear ratings. The Federal agency spot-checked tires to make sure ratings were not overstated, but it had no power to reinspect companies' tires underrating tires and, thus, making comparisons difficult.

Research Project Under Way

The six independent research companies that do most of the testing are under contracts with the tire makers or with the Government. Spokesmen for several research companies said the test procedures needed improvement but that the standard was workable and useful.

The Administration has already begun a two-year research project to see if improvements can be made or if the program should be eliminated. A Government official who favors the program said he did not expect the grading system to survive. He added that the safety agency stopped enforcing the standard last July and dismissed its inspectors.

Mr. Peck, of the federal safety agency, said he had an open mind about the standard. "If we had really intended to kill the standard, we would have made comments upon the ratings off their cuffs and paperwork unnecessary," he said. "I am not shy about rescinding a standard and that is not what I did. We are suspending it and doing research on it because the standard has the capacity to be misleading."

The Vice President's Task Force for Regulatory Relief selected the standard as a target for repeal last year. The safety agency said the suspension would save the industry part $10 million a year, or about 6 cents on the cost of a tire. Allowing consumers to select ... with the standard as they ... drive new tires will, save them $30 million more, according to the agency.

Ruling Called 'Hypocritical'

Consumer advocates reacted to the suspension angrily. Joan Claybrook, president of Public Citizen, a Ralph Nader group, said, "The ambitious proponent of the tread-wear standard is hypocritical for an Administration that claims to want the free market to work."

Miss Claybrook, head of the safety agency in the Carter Administration, said the tire was the most complex part of a car and was generally the most expensive replacement part, costing owners an average of $300 every three years.

A January 1981 national survey conducted by Uniroyal found that 39 percent of the 750 respondents knew about tread-wear grades and that 47 percent of them thought it was the most important tire quality to be tested.

The tread-wear regulation was the most important part of the Uniform Tire Quality Grading System. The system also requires manufacturers to rate tire traction and heat resistance, but these two ratings, which vary little among most tires, have not been challenged.

Problems in Tests

No one disputes that the tread-wear tests have technical problems. In a June 1980 internal memorandum, A.E. Pehill, Jr., an engineer for the traffic safety agency, listed many irregularities in test procedures and concluded that the tests could be greatly improved. Uniroyal, in a Jan. 23 petition to the agency, also identified many technical flaws and their solutions.

The uniform grading system was mandated in 1966 by Congress, which required it to be in place by 1968. The action came after the Federal Trade Commission found that there was "a great deal of consumer confusion and deception" concerning tire sizes. Among other things, the manufacturer's third-rate tire was often sold as a premium tire under a private label.

"The price of a tire has no determinable relationship to its quality or safety level," said Paul Rand Dixon, the F.T.C. chairman at the time.

The traffic safety agency issued its regulation in 1971, after a successful lawsuit by a Nader group. The tire industry objected to the test procedures, but the rule was upheld by the United States Court of Appeals for the Sixth Circuit.

"This situation calls for reasonably fair and reasonably reliable grading procedures, not theoretical protection," the court stated in 1976. Consequently, the grading system was put into effect, starting with best tires in March 1979 and ending with radial tires in March 1980.

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